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Questions of Liability in Value Added Network Services : The Case of Electronic Funds Transfers

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Introduction

1. It is commonly said that technical progress in broadcasting, telecommunications and data processing systems, is a challenge to the legal community.
It is questionable whether new information techniques tend to create new legal concepts such as computer agreements ("contrats informatiques") or new legal disciplines such as data processing law ("droit de l'informatique") but they surely force lawyers to reanalyse their basic classifications and to wonder about their relevance.
For example, the combination of computers and telecommunications (known as "telematics") allows the processing and transmission of data over long distances; legal and scientific data bases are accessible to a user located thousands of miles away, contracts can be concluded at long distance, electronic payments provide for an almost immediate settlement of large amounts through various networks of financial institutions, clearing houses and electonic data interchange systems.

All these "telematics" transactions present common features :
1° they tend to be performed without any long term fixation or without incorporation of the relevant data on a paper bearing a written signature, which raises evidentiary problems;
2° they are technically complex and involve a large number of parties who are often located in different countries and who participate in networks or associations generating their own regulations.

In terms of liability, it means that, if damages occur, compensation may be difficult to obtain because the source of the damages is difficult to identify. A fault cannot easily be proved due to the lack of technical standards, suits cannot be started because the parties have no direct contractual relationship or because providers of value added services have stipulated exemption clauses. All these problems are, of

course, not totally new but they are revived and multiplied so that the conclusion may be that one should approach liability problems in terms of risks instead of fault.

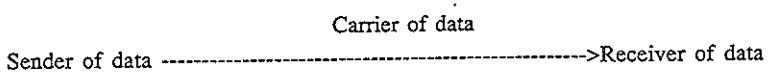
2. This paper does not aim to present a comprehensive overview of liability problems in value added networks.
Time is not ripe for such an approach : value added network services are not well defined and liability for services as such remains a difficult legal issue. Thus, I will focus on a particular application, electronic fund transfers between professional users, which have already been operating for years and which have given rise to interesting case law.
Some private and collective agreements are also emerging in this sector, e.g. SWIFT or CHIPS regulations which could serve as examples for other value added network services with regard to allocation of liability.

3. For obvious reasons, the legal analysis is done from the standpoint of French and Belgian private law, with frequent references to Anglo American law.
It has to be remembered that in most cases the electronic fund transfer is an international operation and that the law applicable thereto will not necessarily be the civil law as provided in the Napoleonic Code either because another legal system has been expressly chosen by the parties, or because the characteristics of the transaction such as the place of performance result in the problems which may arise being dealt with outside the system provided for by the Napoleonic Code.

Chapter I. Financial Transaction at a Distance : The Actors

4. We shall present below simplified charts in order to bring out the fundamental elements characterising teletransmission of data using either the telex, the telephone or telematics (telecommunications, plus data processing).

The teletransmission of data involves at least three parties, as illustrated in the following chart :

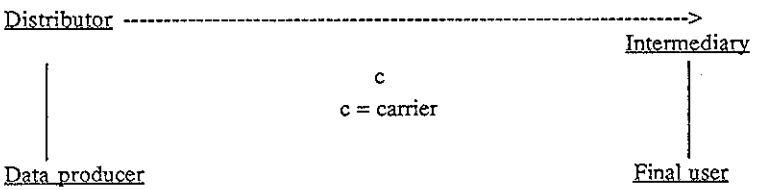


5. *1)The Sender and the Receiver of Data*

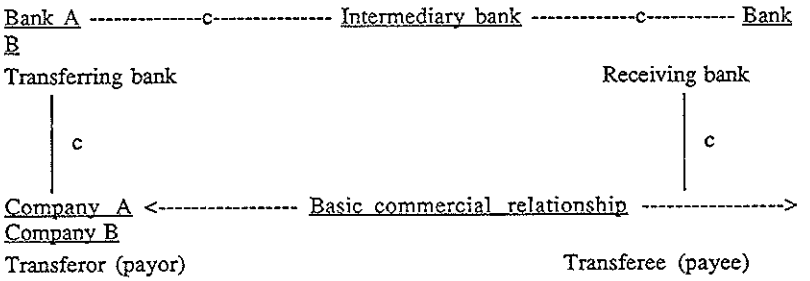
The sender may be a company using the telecommunications network to place an order for goods or services whose particulars are teletransmitted. Conversely, the receiver will be the company accepting the offer.

The sender of the data is not necessarily unique and it happens frequently that several natural and/or legal persons together produce data or cooperate to transmit data through the network.

For instance in the field of data bases, the sender is often composed of a data producer and a data distributor (host computers). The work of the data producer preceeds the intervention of the distributor; it may be that intermediaries come between the distributor and the final user of the data to select and to adapt them to the needs of the user.



6. In an electronic fund transfer, the customer ordering the transfer and the transferring bank produce the message. The adressee is then composed of the receiving bank and of its customer, i.e. the company benefiting from the transfer.

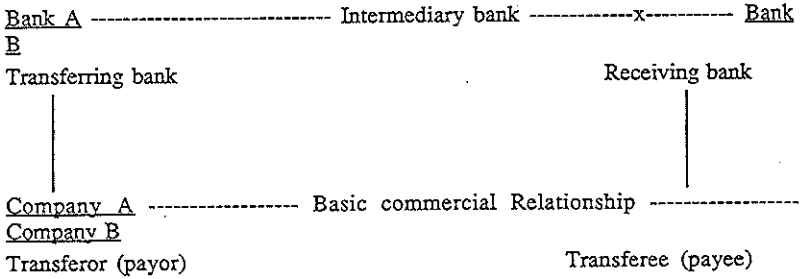


7. 2) *The Carrier of the Data*

The carrier provides the link and ensures transmission of the data between the sender and the user. This transmission often requires the cooperation of different carriers, e.g. in the case of transborder data flows.

8. 1°The question whether public telecomunications carriers should continue to be exonerated from all liability for losses arising out of a lost or delayed message or from changes in the content of the message is a very debated issue I will not discuss here. Let us concentrate on the consequences that such exemption implies for other participants in the network.

If such exemption of liability is total or partial (e.g. liability limited to certain events, to certain damages, to maximum amounts), the question arises who in the network will bear the loss.
Example : in an electronic transfer, if the message is distorted or derouted as a result of a fraud committed by tapping telecommunications transmission, who is going to pay at the end of the day ? The transferor ? His bank ? The intermediary bank ? (for proposals, see here after). The chart herebelow illustrates the problem.



(x) indicates the location of the fraud

9. 2°The lines permitting the transmission of the information may be hired by the P.T.T. to a private company as it is the case for the SWIFT network. In that case, one might sustain that such a private company is not entitled to a total exemption of liability if it exerts full control over the network. SWIFT regulations give a good example of how liability can be allocated between the banks and the private carrier (see hereafter).

Chapter II. Financial Transactions and Classical Liability Requirements

Section I. Damages

A. Possible Risks, Recoverable Damages

10. Damage is the first condition of an obligation to pay compensation. What then are the risks arising out of the use of a telecommunication network and what possible damage could result ?
1° the transmission of incomplete or incorrect data to the adressee;
2° the transmission of the data to an erroneous addressee;
3° the transmission of the data by an unauthorized sender;
4° delay in the transmission of the data.

11. Damages arising out of an incorrect transmission (fraudulent or not) in a financial telecommunication network may be particularly serious :
1) The loss (total or partial) of the principal amount
This may happen when an electronic fund transfer is credited to the wrong account, credited to the right account in an excessive amount or credited twice on the same account and when the beneficiary withdraws the funds that he is no longer able to give back.
2) Loss of interests
This results from delays in the transfer, either caused by the banks or by their customers who tend, for cash management reasons, to withhold the order until the last moment.
3) Losses due to exchange rates fluctuations
These happen when a delay in the transfer is combined with an exchange rate fluctuation in international transactions.
4) Other damages
The draft legal guide on electronic funds transfers mentions, as examples of other damages, the loss of a contract or the imposition of a penalty charged to the transferor because the order has not been performed properly. These damages are called consequential damages in the US wording.

From a continental standpoint, these damages must be foreseeable in order to be compensated (see below B). This requires further explanation.

B. Recoverable Damages : Summary of the Principles - Comments

12. In the contractual field, articles 1150 and 1151 of the Napoleonic Code establish two important principles :
1° A debtor is liable only for damages which were foreseen or which he could have foreseen at the time of the contract unless he wilfully failed to fulfill the obligation (see art. 1150).

2° Even in cases of wilful default, indirect damages are not recoverable (see art. 1151).

13. I would like to emphasize the importance of this "foreseeability principle", and the problems it raises.

1° Between banks and their customers :
Since unforeseeable damage is as a rule not recoverable, the transferor could notify the transferring bank of the consequences which could result from non performance or from a delay in performing the order of transfer. Having been so informed, the bank could not invoke the unforeseeability of the damage. This suggestion diminishes the risk of non indemnification for the transferor.
It is rightly pointed out that this information is not usually communicated either to the intermediary bank, or to the beneficiary bank. There is no reason why it should not be added to the instructions which are sent by the transferring bank although some technical difficulties may arise because of the use of standard form messages. On the other hand, EFT agreements concluded between the banks and their customers contain clauses excluding direct or indirect indemnification even if the damages are foreseeable.

Example : "The customer and the bank agree explicitly that any financial or commercial prejudice or damage (e.g. loss of profits, commercial damages) or any action started against the customer by a third party constitutes indirect damage and does not entitle him to indemnification even if the bank has been advised that such damages are likely to occur".

The last part of this clause refers explicitly to client notifying his bank of the possible damages which would result from the non performance of this order and to the fact that, as a result of the notification, the damages become foreseeable.
This exemption for the bank is very broad but it remains valid as it does not exempt the bank in case of its fault or its gross negligence and provided that the actual substance of the obligation is not affected.

2° Between banks themselves, the "foreseeability principle" seems to have been applied by some US Courts, with negative consequences for the customer of the transferring bank.
In Evra Corp. v. Swiss Bank Corp. (673 F2d 951 (1982)), the Court of Appeal 7th Circuit held that a correspondent bank that failed to transmit a wire transfer could not be held liable for consequential damages because it had not been placed on notice of the special circumstances underlying the transaction. This decision has been severely criticized by some commentators because it attributes the negligent acts of both the plaintiff's (customer) primary bank and its correspondent to the customer. The repercussions of a correspondent bank's default on the customer may not be taken into account satisfactorily by the legal approach which focusses

on the independence of agreements (privity rule) and tends to keep separate the interbank relationship and the bank-customer relationship (for further comments on Evra Corp see hereafter).

Section II. Allocation of Liability

14. After having discussed the problem of the damages, this section will be devoted to the two other conditions required for liability, i.e. fault and causal link. These two elements cannot easily be separated because the establishment of the causal link is, as a matter of fact, influenced by the assessment of the fault. We have already seen that the qualification of the damages themselves, direct or indirect, was connected with the causal link.
We will examine the problems of liability arising in the relationship between a creditor and a debtor who is the issuer of the payment order, i.e. the transferor (A). The relationship of the latter with his bank will also be examined (B). This will be the heart of this section; particular attention will be paid to the possible liability of the transferring bank for the whole network and to the setting up of adequate security procedures in order to avoid unauthorized transfers.
The interbank relationship will also be examined. SWIFT regulations will serve as a basis for the analysis (C). Lastly, Evra Corp. v. Swiss Bank, the leading case in "wholesale" E.F.T. will be examined in detail to illustrate the principles (D).

A. *Relationship Between Transferor (Debtor) and Creditor*

Legally, from the point of view of the creditor, the reasons for non payment or for delayed payment, may be of one of two kinds.

1° Causes attributable to the debtor

15. The transferor who issues an order having an obligation to the beneficiary, is liable to the latter for the good performance of the order and cannot in principle invoke a subsequently intervening failure of his bank or of a transmitting institution. This means that vis-à-vis the beneficiary the transferor bears the consequences of delayed performance of the order or of non performance owing to the fault of his bank (e.g. delayed or uncorrect performance of a correctly given payment order or of an order given in due time by the debtor).

16. 2° Causes non attributable to the debtor

The obligation to pay (understood in its normal sense as the obligation to make over a certain amount of money) resting with the debtor is an obligation to achieve a result to which article 1147 of the Civil Code applies. A debtor is liable for the payment of damages unless he proves that the nonexecution of the obligation resulted from an outside cause which cannot be imputed to him and further that there was no bad faith on his part. The concept of outside cause comprises force

majeure (or act of God) (a), acts of third parties (b) and acts of the creditor himself (c).

a) According to the Belgian Supreme Court, force majeure in order to relieve the debtor from its obligation the pay damages and interest presupposes an event making the performance of his obligation impossible and whose cause is not imputable to any fault of the debtor. Whether performance is possible or not has to be assessed reasonably.
In our opinion, act of God or force majeure will have the following role in the field of electronic fund transfers. Let us assume that an intermediary bank has gone bankrupt or the even more clear-cut situation where the telecommunication network has broken down. This breakdown which is unforeseeable and beyond the control of the debtor, does not make the execution of his obligation impossible as alternative means of settlement such as the sending of a cheque remain possible. The debtor can only take advantage of the outside cause to justify a certain delay in payment and avoid contractual sanctions, such as penal clauses, termination of the agreement ...

b) The fault of a third party, in principle, exempts the debtor from liability provided that the debtor is not responsible for this third party. Belgian case law upholds that the debtor (Company A in the chart supra) is liable for the performance of his obligation towards the other contracting party even if he uses an agent to perform that obligation. The debtor's bank or an intermediary bank chosen by the transferring bank are not really third parties as the debtor has chosen them directly or indirectly to perform the payment. Consequently he is liable for their fault vis-à-vis the creditor (Company B in our chart).

c) The act of the creditor. Understandably the fault of the creditor releases the debtor totally or partially from his liability. By virtue of this principle, the transferor should not bear the risk for a failure of his creditor's bank (Bank B in our chart). Whether this bank is considered as an agent of the creditor for the purposes of receiving the payment or not, it has been chosen by the creditor who is held to take on the consequences of his choice.

Conclusion : as the above text suggests, the transferor alone answers for the good execution of the transfer vis-à-vis his creditor. The intermediary banks are his instruments in this even if he only has a contractual relationship with his own bank. Consequently, the risk of non payment, or of delayed payment, rests with the debtor subject to force majeure and to the beneficiary's bank failure.

B. Relationship Between the Transferor and his Bank

17. After having stated that the transferor is, as a rule, liable towards the creditor, one has to decide whether the transferor or his bank is "in fine" liable for the damage, consisting of a loss of interests for which the beneficiary claims payment or more seriously of a loss of capital which the transferor owes to the beneficiary. Another case where the financial consequences are more serious for the bank may occur : an erroneous or delayed transfer causes the loss or the termination of an agreement out of which the transferor hoped to make substantial profits. Must the bank indemnify the transferor for this ?
Indeed, the response to these questions is to be found in general principles (who is at fault ? Is the damage a necessary consequence of this fault ?) in order to be more specific, however, we first turn to the EFT agreements concluded between the transferor and his bank, particularly to the exemption clauses which reveal how the parties have adapted (or distorted) general principles.

We limit our investigation to two types of clauses.

1° Clauses relating to the occurrence of an outside cause*

18. A first classical kind of clause states that the bank undertakes to perform its duty with all due care and diligence. Nevertheless the bank is not liable for errors and anomalies caused by breakdowns and other failures of the public data transmission networks. This clause complies with common principles.

19. A second kind of clause broadens the concept of force majeure in a significant way and stipulates, for instance, that "the bank can never be held liable for a temporary interruption in the service due to events beyond its control such as a breakdown, the telephone lines being cut off, strikes or circumstances justifying such an interruption such as for instance work to improve existing equipment. The bank shall take all measures in its power to limit such interruptions to a minimum".
As such, a strike is not a case of force majeure, but the parties can stipulate that all the strikes will be considered as an exculpatory factor.
As for a breakdown the question is : which type of breakdown is it ? A shortage of power supply ? Fire ? Breakdown in the computer system or a bug in the software affecting the whole processing system ?
The last example broadens unquestionably the notion of force majeure. In our opinion, the bank should in principle have back up equipment in order to provide the customer with an uninterrupted service.

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* For clauses relating to unforeseeable damages see above n°13.

20. One could also conceive a third type of clause whereby the transferring bank exempts itself from any liability for delays or losses caused by intermediary banks, clearing houses, interbank carriers (such as SWIFT) and more generally by third party services.

21. Such clause could be understandable but makes the situation difficult to handle from a legal point of view; on the one hand a bank cannot be held liable for faults of any third party; in some cases it has no real choice or the choice is reasonable : clearing houses may be legally imposed, the transferor himself may have asked for a SWIFT transfer, a first class bank has gone bankrupt, which could not be foreseen.
On the other hand, the transferor, by virtue of such clause, is deprived of any action against his own bank and does not have any direct contractual recourse against the correspondent bank (except if one considers that the transferor benefits from some form of stipulation attached to the agreement concluded between the banks). Moreover, an action on a delictual basis (civil code art 1382) against the third party is uncertain and may be not entirely satisfactory on the theoretical side.

22. The situation does not really fit within the four corners of the classical rules on liability because no real lack of care has been shown by the transferor's bank in its choice of the third party. But is it fair to impose the risk of the whole operation on the transferor.
That is the reason why some authors have suggested to put all the risks on the transferor's bank, referring to the international carriage of goods where article 3 of the CMR convention states : "The carrier shall be responsible for the acts and omissions of his agents and servants and of any other persons of whose services he may use for the performance of the carriage ... as if such acts and omissions were his own". This is an interesting precedent for possible guidelines on electronic transfers of funds.

2° Clauses relating to unauthorized transfers

23. The following clause gives a typical example of how the agreements deal with the consequences of fraud. "The direct or indirect consequences, if any, resulting from the misuse of the service, either by authorized users, or by third parties will not be borne by the bank. The subscriber hereby agrees to assume full responsibility for such misuse".
The customer is liable for fraud perpetrated by his employees (authorized or not) and even that perpetrated by third parties. His account will thus be debited in accordance with all transfer orders even if they are forged.
The grounds for liability resting with the customer could be searched for in the classical concept of fault but the concept of risk seems to provide a more appropriate basis.

This solution is indeed understandable because the customer controls or should control the premises from where the order is issued. Through special clauses ruling evidentiary problems, the customer's liability is also implicitly extended to the transmission of the message over the lines between his own computer system and the computer system of the bank.
The agreements provide painstakingly for the onus of proof by providing e.g. that the "logging" (computer generated list of effected transactions) produced by the bank constitutes formal and satisfactory evidence of the orders given by the subscriber (customer). Thus, the logging generated by the bank computer is deemed to register the customer's instructions faithfully. It means that the customer is made liable for the order emanating from his premises until it reaches the bank computer (the transmission over the telecommunications lines is included). This shows that questions of proof and liability probems are closely connected.

24. The transaction should not be of an obviously unusual character, in which case it should attract attention at the bank. A transaction may be obviously unusual if it relates to amounts higher than those generally dealt in or if it is addressed to a recipient not previously known to the bank.

25. If the fraud at the customer's premises has been made possible by an inadequate security system put into operation by the bank, the liability of the bank seems to be brought into play. Although the customer (a company and, as such, a professional) chooses his means of payment , the banker, on the other hand, as professional credit organisation, should be held primarily responsible for the data processing system he offers for the organization and the rationalization of its banking services.

26. Such an approach has been adopted in two important documents relating to EFT.

In the U.S.A., works are now in progress in order to add a new Article 4 A to the Uniform Commercial Code in order to include E.F.T. New Article 4 A, which would cover wholesale wire transfer provides that "If a security procedure is in effect with respect to an unauthorized payment order received by the receiver, the purported sender is bound by the order if the court finds that the security procedure was a commercially reasonable method of providing security against unauthorized payment orders ..." (§ 4A - 202 (2)).
"... commercial reasonableness of a security procedure is a question of law and is to be determined by considering the wishes of the purported sender expressed to the receiver including the amount and frequency of payment orders normally issued by the purported sender, alternative procedures offered to the purported

sender, and security procedures in general used by senders and receivers similarly situated" (§ 4 A-202 (3)).

The principle is that the banks have the burden of assuring that security procedures in use are commercially reasonable because they are in the best position to provide a security procedure that will prevent fraud.
A similar approach has been taken by the UNCITRAL Working Group on EFT (A/CN9/WG.IV/WP39 p. 12 and seq.).

27. This solution seems reasonable even if the confrontation of two professionals, the bank and the company, leaves more room for discussion than in the case of consumer-oriented system (in Belgium, Mister Cash, Bancontact ...).
An interesting case has recently been settled by the Courts of Verviers in consumer-oriented systems, which illustrates the above-mentioned principles. The holder of means of access issued by Postomat had lost his magnetic card and his secret code written down in a note book, which is a contractual fault. As a result of this, unauthorized withdrawals had been made from his account during the week end. As the issuer of the means of access (Office des Chèques Postaux) had not provided for any notification procedure during the week end, the holder had to wait until November the 2d to notify the loss.
The Belgian courts have considered that the Belgian Post Office was totally responsible for the unauthorized transfers because the system did not present a sufficient level of security on week ends.

C. Interbank Relationships

28. Between financial institutions, liability problems are no less complex. When does the liability for an order pass from one institution to another ? In this respect, SWIFT is an interesting example as to the allocation of liabilities which could inspire other telematic networks. SWIFT is liable for providing those services to user set forth in its service description and for the maintenance of security (art. 7.1.).
SWIFT undertakes to indemnify the user for loss of interest due to a delay in payment when the delay results from SWIFT's fault. But SWIFT is only liable for loss or direct damage sustained by a member observing the procedure and within the limits provided for by the user Handbook (art. 7.2.2.). The liability is limited to a maximum : one billion Belgian francs for direct loss or damage resulting from any fraudulent or dishonest act committed by SWIFT employees and 400 million Belgian francs for error or omission. SWIFT is not liable for fraudulent transfers involving persons not employed by SWIFT.
It has to be pointed out that SWIFT limits its liability to direct damage, i.e. the loss of the funds comprising the amount of the transfer as well as loss of interest. The bank which sends a message is as a rule responsible for it until the point when the message has been acknowledged by SWIFT.

A bank which receives the message is as a rule responsible from the point at which the message is delivered by SWIFT. The subscribers to the network are bound to observe the formal and procedural rules and act with due diligence.

29. A system such as SWIFT involves a three stages process based on a risk allocation. The sending bank bears risks prior to the release of message, SWIFT covers the period between the release of the message and the delivery of the message to the receiving bank, the latter being liable after receipt.

This allocation of liability implies that the procedure ruling delivery and receipt of the message be carefully determined.
— The sending bank is liable for interest losses resulting from delays if it enters a message in an inappropriate format (art. 6.5. (d)), if SWIFT did not respond to an urgent priority message (art. 6.5. (c)), if SWIFT fails to acknowledge the message which subsequently appears in the Undelivered Message Report (6.5. (b)), or if the sender does not react promptly to SWIFT notification that a bank, regional processor or operating centre is down (art. 6.5. (c)).
— The receiving bank is liable (see art. 6.6.) if its fails to carry on the message with appropriate value, to reast to system messages promptly, to complete an adequate OSN reconciliation to ensure receipt of all messages from SWIFT, to follow SWIFT's terminal correction policy, to follow normal banking practices.

D. Evra Corp. v. Swiss Bank Corp.

30. In 1972, Hyman Michaels Company, a large Chicago dealer in scrap metal, (whose name was changed in 1976 to Evra Corporation), entered into a two-year contract to supply steel scrap to a Brazilian corporation. It chartered a ship, the Pandora, to carry the scrap to Brazil. Under the charter, payment for the hire of the ship was to be made semi-monthly in advance and, if not made on time, the Pandora's owner could cancel the charter. Payment was to be made by deposit to the owner's account in the Banque de Paris et des Pays-Bas in Geneva (Switzerland).
The usual method used by Hyman Michaels was to request Continental, its bank in Chicago where it had an account, to make a wire transfer of funds to the schipowner's account in Geneva, Switzerland.
The process was the following. Continental would debit Hyman Michael's account by the amount of the payment and then send a telex to its London office for retransmission to Swiss Bank Corporation, its correspondent bank in Geneva, asking Swiss Bank to deposit the amount in Banque de Paris account of the Pandora's owner. In turn, Swiss Bank's account at Continental would be credited by the same amount.
When Hyman-Michaels chartered the ship in June 1972, market rates were low but they soon began to climb and the Pandora's owners were eager to get out of the charter if they could.

A first incident took place in October 1972, when Hyman-Michaels instead of using the wire transfer service had mailed a check for the October 26 installment which did not reach Geneva on the twenty-sixth. .
Pandora shipping notified on October 30 it was canceling the charter because of the breach of the payment term. The matter was referred to arbitration in accordance with the charter and the panel of arbitrators ruled in favour of Hyman-Michaels on December 5, 1972.
Hyman-Michaels reverted to the use of wire transfers for payment of the charter installments and instructed its accounting department to request that Continental send a wire transfer "a few days" before each payment was due.

On the morning of April 25, 1973, it telephoned Continental Bank and requested it to transfer $ 27,000 to the Banque de Paris account of the shipowners in payment for the charter hire period from April 27 to May 11, 1973. Since the charter provided for payment "in advance", this payment arguable was due by the close of business on April 26. Continental sent off a telex to its London office on April 25, which reached England at night. Early the next morning, a telex operator in Continental's London office tried repeatedly to contact Swiss Bank's general number, but it was busy. After trying unsuccessfully for an hour, the Continental telex operator dialed another number, that of a telex machine in Swiss Bank's foreign exchange department that he had used in the past when the general number was engaged. The machine in Swiss Bank's foreign exchange department signalled the sending machine at both the beginning and end of the transmission that the telex was being received. (It gave an "answer back" at both moments).
Nevertheless, Swiss Bank did not act on the payment order and no transfer was made to the account of the shipowner in the Banque de Paris. Nobody knows exactly what went wrong. There was speculation that either the receiving telex machine had run out of paper so that the message was never printed or that the message intended for a different department from that in which it was received, was not delivered to the banking department.

Early on April 27, Hyman-Michaels received a telex message from the shipowner announcing that the charter was cancelled, because payment had not been made. Hyman-Michaels called Continental and told it to continue to effect payment even if Pandora's owner rejected it.
Days passed while the banks unsuccessfully searched for the lost telex message, and finally Swiss Bank suggested to Continental that it retransmit the message and this was done on May 1.
The next day (May 2), Swiss Bank attempted to deposit the money into the account of the shipowner at the Banque de Paris but the payment was refused.
The arbitration panel concluded that the shipowner was entitled to cancel the agreement because Hyman-Michaels, although "blameless" until the morning of April 27, had failed to do everything in its power to remedy the situation. The arbitrators held that Hyman-Michaels should have ordered an immediate duplicate

payment upon learning of the problem instead of relying on the banks to sort it out.
Hyman-Michaels then brought an action against Swiss Bank to recover both its expenses in the second arbitration proceedings and the profits that it lost because of the cancellation of the charter. (Hyman-Michaels had to subcharter the same ship at a rate twice that which it had been paying). All banks, further to cross claim and counterclaim procedure, were finally involved in the case.

31. The case was tried by a district judge without a jury (522 F.Supp. 820 (N.D.III, 1981).
He first decided that Illinois law governed the case and that under it Swiss Bank had been negligent.
This negligence had been the cause of Hyman-Michaels's loss. It was therefore liable to Hyman-Michaels for $ 2,1 million in damages ($ 15,000 in arbitration expenses and the rest in lost profits on the subcharter of the Pandora). Neither Hyman-Michaels nor Continental were guilty of negligence.
The court of appeals reversed the decision, holding that Swiss Bank could not be held liable for consequential damages even though it had been negligent because it had not been placed on notice of any special circumstances underlying the wire transfer at issue.

32. This case illustrates typical problems encountered in EFT and in value added networks in general.

1. The first question was choice of law as the parties to the litigation belonged to different countries. I will not address this question here. Nevertheless one has to underline the importance of this issue. E.g. under Swiss law a bank cannot be held liable to someone with whom it is not in privity of contract and there was no contract between Swiss Bank and Hyman-Michaels. Illinois does not have such a privity requirement.
However, the court of Appeals without much justification upheld that it does not make any difference as to the outcome (p. 955).

33. 2. What kind of damages are recoverable ?
In the event an EFT is not performed on time by a bank, it can cause several types of loss. The funds themselves, or interest on them may be lost, as well as the fee paid for the transfer. These are in American law direct or general damages.
In Evra case, Hyman-Michaels was not seeking any direct damages as the amount of the transfer itself was not lost. The debited account was not an interest bearing account and Hyman-Michaels paid no fee for the aborted transfer.
A second type of loss consists of consequential or special damages caused by failure or delay in carrying out a commercial undertaking, e.g. imposition of a penalty clause or cancellation of a highly profitable contract.

The rule laid down by the court of Appeals in Evra Case is that only general damages are taken into account and give rise to indemnification unless at the time the request for transfer of funds is made, the bank is made aware of the nature of the transaction and the consequences of a failure to properly make the transfer.
Swiss Bank was thus not held responsible for the consequences of its gross negligence in failing to respond to the telex message, although this uncontroverted negligence was the "root cause" of Hyman-Michaels loss.

34. Could the use of electronic transfer system be considered as sufficient to put Swiss Bank on notice ?
Divergent answers have been brought to that question.
For the district court "The fact that the plaintiff was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank to the importance of the transaction". (522 F.Supp. 820 (1981) at p. 833). Contrary to this view, the court of Appeals ruled that : "Electronic fund transfers are not so unusual as to automatically place a bank on notice of extraordinary consequence if such a transfer goes awry. Swiss Bank did not have enough information to infer that if it lost a $ 27,000 payment order, it would face a liability in excess of $ 2 million" (673 Fed. 9651 at p.956).
In this view, the court of Appeals seems to have taken into account the absence of a contract between Hyman-Michaels and Swiss Bank "Privity is not a wholly artificial concept. It is one thing to imply a duty to one with whom one has a contract and another to imply it to "the entire world" (at p.956).
One could argue though, that Swiss Bank, as a matter of fact, was not really a third party as "it knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora" (at p. 958).

35. One can see that, in order to be compensated, a damage must be foreseeable as well under French law (see above). But the problem is to determine in fact what is foreseeable and on the basis of which criteria ? Should the method used for the transfer and the "quasi" contractual relationship between the customer and the correspondent bank not be taken into account for assessing foreseeability ?
According to bankers, Evra does not provide a practical solution to the problem of bank liability for consequential damages (what information would be required to give adequate notice ? It seems impracticable to convey notice for thousands messages a day ...).

36. 3.What kind of diligence can reasonably be expected from the customer on the one hand, from the banks on the other hand ? Assessment of the fault.
If one tries to apply the traditional criterion of fault, one finds, without any doubt, that Swiss Bank committed a gross negligence, failing to provide a procedure for checking the telex machines to see if they needed paper. Moreover, they were operated by junior foreign exchange dealers. The district court found "such a

cavalier attitude toward major transactions by a sophisticated international bank ... shocking" (at p. 829) Swiss Bank's negligence was also recognized by the Court of Appeals but not taken into account for allocation of damages as they were impredictable (see above).
Continental Bank also turned out to be negligent in that, being aware of the consequences of Swiss Bank's failure to effect payment, it did not put Swiss Bank on notice that substantial amounts were into play. Neither bank took the appropriate action when it learned that payment had not been made, wasting 5/6 days to trace the lost instruction.
Strangely enough, the Court of Appeals insisted on Hyman-Michaels' negligence. It was imprudent in waiting till "arguably the last day before payment was due" to instruct its bank. Moreover, when the problem arose, "The action taken was immediate but did not prove to be adequate in that (Continental) Bank required some 5/6 days to trace and effect the lost instruction to remit. (Hyman-Michaels) could have ordered an immediate payment - or even sent - a banker's check by hand or special messengers, so that the funds could have reached owner's Bank, not later than April 28th" (at p.954).

37. This last passage is very clear : although recognizing banks' lack of efficiency, it holds the bank customer responsible for a routine wire transfer and for choosing the best way to effect payment instead of the two banks.
The result is the following : Continental, which was aware of the circumstances underlying the transaction, was not liable because Swiss Bank's negligent act caused the non receipt of the payment, and Swiss Bank, which committed the negligent act, was not liable because it had not been put on notice of the circumstances of the wire transfer in question. So the customer remains liable for the loss. Such a solution is commented herebelow.

38. Such a result seems unacceptable. Electronic techniques increase the speed with which transfers of funds can be made. One can expect that it will require a higher degree of diligence on the part of all the parties concerned. Indeed, the customer has to react promptly when he learns of an anomaly either from his contracting party or from the statements of accounts regularly delivered to him by his bank. But customer's expectations of prompt and accurate service will also be seen as increasingly legitimate.
The total lack of adequate security systems protecting sophisticated means of payment is to be considered as a gross negligence or as a fault (art. 1382 Civ. Code).
In Evra, both banks have failed to take appropriate measures. The right solution should have been to hold both banks jointly liable for their combined negligence (responsabilité in solidum) and force them to settle the dispute between themselves.

39. A difficult problem could arise if the transferring bank is totally blameless for the delayed or for the erroneous transfer.
In that case, as a direct recourse against the correspondent bank may turn out to be unsuccessful because of the privity rule, the customer would be deprived of any indemnification.
The best way to deal with the problem could be to hold the transferring bank liable for its correspondent's negligence (see above).
A recent decision of the Belgian Supreme Court (Cour de Cassation, 21 juin 1979, Pas. 1979, I, 1225) has recently stated that the transferring bank (Banque IPPA) was liable vis-à-vis its customer (Goldenberg) because the correspondent bank (First National City Bank) had not carried out IPPA's instructions.
It is interesting to note that there was no personal fault of IPPA whatsoever but it was held responsible for its correspondent's faulty act.
The basis for such solution can be found in the classical rules on liability : transferring banks have to perform their mission properly either by themselves, or by resorting to third parties whose fault bring their own liability into play.
One could also sustain that the transferring bank (Continental) has not made a reasonable choice and therefore is liable for its correspondent's negligence. All these justifications rest on the traditional criterion of fault.

40. With the development of new electronic banking techniques and perhaps, because of them, other ideas and criteria are emerging.
The bank is in the business of transmitting money and thus presumably is in a better position than its customer to know how best to effect payment and to control all aspects of a wire transfer. As the bank is the cheapest cost avoider, it has to take the corrective measures in case of erroneous or delayed transfer. The following step is summarized by VASSEUR : "Professionnel, le banquier répond de sa technique, il en répond, c'est-à-dire qu'il en est responsable, il en assume le risque".[1]
In this theory, the banks would take on all the risks associated with transfers of funds, whether they commit a fault or not.

Even if such solution seems to be simple and attractive, one has to reflect carefully upon the difficulties it raises.
1° Would the banks be held liable in any event, even if the correct execution of the transfer has been prevented or delayed by "force majeure", or by a default of another bank that has been chosen by the transferor himself ?
2° What about the validity of contractual variations to the distribution of risks so provided ?

1 M. VASSEUR, Aspects juridiques des nouveaux moyens de paiement, Rev. de la Banque 1982, p. 592 et s.).

Conclusion

41. The complex legal problems raised in this study must not divert attention from more fundamental issues of principle. Although as lawyers we tend to highlight possible areas of disputes, such disputes have not been frequent. The explanation for this resides in two main factors.
1. A high standard of technology with security procedures reduces the source of disputes.
2. The parties to the transaction are professional anxious to settle their disputes on an amicable basis and also to prevent them by using ever more reliable techniques and by informal self regulating systems (technical norms, agreements between members and inter-bank agreements).

The lawyer seems poorly armed to face the challenge posed by the rapid pace of technical evolution. One is strongly tempted to appeal for a legal revolution. Indeed our private law emerged at a time when it did not seem possible to dissociate the concept of economic value from a physical asset. As such, it does not answer all the questions inherent to data processing and transfer of information.
Is far reaching legal reform needed in the field of electronic transfer services ? In our opinion, the answer is negative, at least with regard to liability problems. The technical evolution whose results and progress are gradually defining the real function of the law in this area is not complete by any means. Moreover, one can see, from this first approach that legal problems themselves (foreseeability, privity rule, risk v. fault) are not totally new but only multiplied and revived by the use of new information techniques. The real challenge for lawyers is thus the search, amongst basic concepts, for the key to situations not explicitly envisaged by the legislator.

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